Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1995

Frank A. Greco,
Petitioner,

v.

Atwood & Cherny, Rita Greco,
and Beverly Weaver,
Respondents.

On Petition for Writ Certiorari to the
Supreme Judicial Court for the
Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

-In this case frame of mind is an essential element of each count. The respondents moved for summary judgment and provided affidavits *only* from themselves. Does granting summary judgment conflict with the ruling of this Court in *Sartor v. Arkansas Nat. Gas Corp.* 321 US 620 (1943)?

-Given that the respondents do not identify a single element of this case that must fail, does the granting of summary judgment violate petitioner's constitutional right to a trial by jury?

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JURISDICTION

This case was brought in the superior court of the Commonwealth of Massachusetts. It was dismissed by summary judgment on April 28, 1994. An appeal was taken to the appeals court, which affirmed the superior court judgment on June 5, 1995. An application for further appellate review was denied by the supreme judicial court of Massachusetts, which also denied a petition for rehearing on October 30, 1995. 28 U.S.C. §1257 confers jurisdiction upon this Court to review this judgment.

CONSTITUTIONAL PROVISIONS

Article VII, Amendments of the Constitution of the United States of America: "In suits at common law where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise examined in any Court of the United States, than according to the rules of the common law."

PRELIMINARY STATEMENT

I have decided to write as myself instead of as my attorney and to refer to myself in the first person. I hope that stylistic decision does not interfere with the presentation of the facts. Most of the arguments use circumstantial evidence and the number of documents necessary to support all statements of fact is quite large; the state court appendix

was 181 pages. Where the source has a common name such as a deposition, I have used that name; otherwise I have cited the page in the state court appendix to indicate where documentation exists to support the fact asserted. Many of the facts about which I have first hand knowledge I have left uncited. I filed an affidavit with my opposition to the respondents' motions for summary judgment. In lieu of submitting an affidavit with this petition, I have sworn to the truthfulness of all facts used.

STATEMENT OF THE CASE

Respondent Rita Greco is my former wife. Atwood & Cherny is a law firm in Boston, MA, which represented Rita Greco when she filed for divorce. Beaverly Weaver is a psychiatric nurse in private practice in Brookline, MA; Ms. Greco consulted Ms. Weaver around the time she filed for divorce. I am a physician licensed in Massachusetts and a Commander in the U.S. Naval Reserve.

Shortly before Ms. Greco filed for divorce, we refinanced a parcel of undeveloped land in Duxbury, MA. In her complaint for divorce, Ms. Greco alleged cruel and abusive treatment on my part and obtained *ex parte* restraining orders against me on the day of filing. I later counterclaimed for divorce and asked for sanctions against Atwood & Cherny pursuant to Rule 11, Mass. R. Civ. P., because they knew that the allegations of cruel and abusive treatment were false at the time they filed them. Two months later Atwood & Cherny withdrew from representing Ms. Greco. While the divorce proceedings were pending, the bank foreclosed our interest in

the land we had just refinanced. A bench trial was held on January 15 and 16, 1991; the probate court determined that I had not been cruel and abusive and granted a divorce on the basis of irretrievable breakdown. M.G.L. c.208, §1B. Because the status of the foreclosed land was not known at trial, the probate court ordered that Ms. Greco and I shall share equally any profit or loss from the foreclosure. The probate court severed the Rule 11 claim against Atwood & Cherny and ordered that I must file a separate complaint and serve them with it.

The instant case was filed in superior court in August 1993. I first demanded my constitutional right to a trial by jury in the complaint. My claims are that Ms. Greco fraudulently misrepresented her intent in refinancing the land because she had decided to divorce me beforehand; Atwood & Cherny and Ms. Weaver aided and abetted her in this scheme (Count One). The three respondents conspired to coordinate perjury (Count Two). The *ex parte* restraining orders were not obtained for the legitimate purpose of preventing immediate and irreparable harm and hence constitute abuse of process (Count Three). Atwood & Cherny violated Rule 11 because they knew that the allegations of cruel and abusive treatment were false at the time they were filed and, even if they did not know this, failed to exercise due diligence in verifying the complaint (Count Four). Count Four is the Rule 11 claim severed from the divorce action by order of the probate court. Ms. Weaver counterclaimed against me for abuse of process.

The respondents conducted no discovery. All three respondents moved for summary judgment. The material offered

in support of their motions included affidavits from each respondent, various pleadings and other documents. Affidavits from the parties were the only affidavits offered. During discovery, Atwood & Cherny stated that they relied solely on the statements of Ms. Greco to verify the allegations in the divorce complaint. I moved for summary judgment on that portion of the Rule 11 claim involving due diligence. I also moved for summary judgment on Ms. Weaver's counterclaim for abuse of process. The superior court took my motion for summary judgment on the Rule 11 claim to be on the entire claim and denied it; my motion on Ms. Weaver's counterclaim was allowed (Appendix, p. 1). The superior court allowed the respondents' motions for summary judgment on all claims. The superior court stated that the fraud count was barred by *res judicata* because of the judgment of divorce (Appendix, pp 1-12). The conspiracy and abuse of process counts were dismissed because there was in the opinion of the court insufficient evidence to establish the claims (Appendix, pp 1-12). I appealed from the dismissal of my complaint; Ms. Weaver did not appeal.

The appeals court did not affirm dismissal on the basis of *res judicata* but nonetheless did affirm the judgment of the superior court on the basis of the sufficiency of the evidence (Appendix, pp. 13-16). My application for further appellate review by the supreme judicial court was denied, as was my petition for rehearing (Appendix, pp. 16-17).

STATEMENT OF THE FACTS

In 1989, while Ms. Greco and I were still married, our estate consisted of a townhouse in Charlestown, MA (the marital home), a parcel of undeveloped land in Duxbury, MA, and an office condominium in Charlestown, MA (my office). Rita Greco had sole title to the home and to the land; we held title to the condominium jointly. A building that abutted our house came on the market in the spring of 1989 and we discussed refinancing the land in Duxbury in order to obtain the downpayment to purchase it. Because Ms. Greco had represented to me that the proceeds from the refinancing would be used to purchase the neighboring building, I co-signed the promissory note for the mortgage. Title remained in her name alone. The land was refinanced for $120,000; approximately $80,000 went to pay off existing debt and $40,000 was placed in a certificate of deposit in the name of Rita Greco alone. The refinancing occurred on July 28, 1989; Atwood & Cherny drafted the divorce complaint on August 31, 1989.

I believe that Ms. Greco decided to divorce me prior to the refinancing and had no intention of purchasing the neighboring building. I believe that Ms. Greco met with Atwood & Cherny and with Ms. Weaver prior to the refinancing and that they advised her not to file for divorce until I had co-signed the promissory note. The respondents deny having any contact with one another until after the refinancing (Affidavits and Answers to Complaint). In response to their denial I have offered the following facts. Muriel Carpenter is an attorney who worked for Atwood & Cherny in 1989 and who

assisted in representing Ms. Greco. Muriel Carpenter has testified that she first met Rita Greco "months" before the pleadings of August 31 (Deposition at 21). Elizabeth DeFalco is "a close friend" of Ms. Greco (Interrogatory No. 4). Ms. DeFalco has testified that Ms. Greco was seeing a "therapist" in the spring of 1989 (Divorce Trial Transcrpt at 138). While Ms. DeFalco did not recall the name of the "therapist," Ms. Greco has denied seeing any "therapist" other than Ms. Weaver (Interrogatory No. 8). Furthermore, Rita Greco denies that she planned to divorce me before the refinancing (Admissions of Fact, No. 21); however, Ms. DeFalco testified that Ms. Greco was interested in divorce in the spring of 1989 (Divorce Trial Transcript at 136).

I did not know that Ms. Greco was seeing Ms. Weaver or had retained Atwood & Cherny until after the refinancing. There was an increase in tension in the marriage as the day approached when Ms. Greco would file for divorce. I did not understand where the tension was coming from and became concerned that it might affect our daughter. I did suggest that it might be best if our daughter, who was three at the time, stayed with my parents in Illinois until we could resolve the tension. I remained optimistic and on August 28, 1989 I signed a purchase and sales agreement for the neighboring building.

On September 1, 1989, Ms. Greco filed a complaint for divorce on the grounds of cruel and abusive treatment and also filed motions requesting temporary restraining orders against me on the basis of immediate and irreparable harm. The probate court granted an *ex parte* hearing; Ms. Greco moved (1) that I be restrained from entering my home; (2)

that I be restrained from disposing of assets; (3) that I be prohibited from imposing any restraint on her personal liberty; (4) that she have sole custody of our daughter; (5) that the Court waive the requirement that we live apart for thirty days before filing a complaint for divorce. These orders were requested pursuant to M.G.L. c. 208, §34B and Rule 65, Mass. R. Dom. Rel. P.. The probate court allowed all the motions for restraining orders.

Ms. Greco filed an affidavit in support of her request for restraining orders, in which she stated the factual basis for obtaining the orders without notice. Although she alleged that I had threatened to "liquidate all of our assets," she did not mention that she had title to all of our assets. Although she alleged that I was depleting the bank accounts so that she "would have no money for support or a lawyer," she did not mention the $40,000 certificate of deposit that was in her name alone or that she was gainfully employed. She alleged that I threatened to take our daughter to Illinois to live with my parents on August 28, 1989. She did not mention that I had signed a purchase and sales agreement on that day. Although she stated that "I expect that my husband may leave with [our daughter] at any time," she did not explain why there was a delay of four days in her seeking the restraining orders. There is no mention of physical abuse or even fear of physical abuse.

In an invoice issued to Ms. Greco by Atwood & Cherny the day after the divorce complaint was drafted, the case is labelled "1A" (State Court Appendix, p. 18). Among lawyers of the Massachusetts's divorce bar, "1A" refers to G.L. ch. 208, §1A, which deals with "no-fault" divorce in contrast to

§1, which deals with fault grounds such as cruel and abusive treatment. Atwood & Cherny has used the expression "1A" in this sense (Probate Court Pre-trial Conference at 7).

M.G.L. c. 208, §34B states if there is a "substantial likelihood of immediate danger" that "*the court* may enter a temporary order without notice, and *shall* immediately thereafter notify said opposing party and give him or her an opportunity to be heard as soon as possible but *not later than five days after such order is entered....*"(emphasis added). The probate court did not order a hearing wihin five days but rather made the orders valid for ninety days. Form CJ-D 421 is a preprinted form for issuing *ex parte* temporary restraining orders which has a blank to indicate when the hearing is scheduled. The probate court did not use this form but rather a form which did not have a blank for the next scheduled hearing. Form CJ-D 212 is a preprinted summons that is to be used when serving temporary restraining orders at the commencement of an action; it has blanks for entering the date of the hearing required by statute. The probate court did not issue Form CJ-D 212 as a summons on September 1, 1989 and I was not served with any summons until September 21, 1989. M.G.L. c. 208, §34C requires that whenever the probate court issues such restraining orders, "the *register shall* transmit two certified copies of each order forthwith to the appropriate law enforcement agency which shall serve one copy of each such order upon the defendant" (emphasis added). M.G.L. c. 208, §34C also states that whenever an order is issued pursuant to §34B, that "[u]nless otherwise ordered by the court, service *shall* be by delivering a copy *in hand* to the defendant"(emphasis added). Ms. Greco

asked Marianne James, a personal friend of hers, to serve me with the temporary restraining orders (Admissions of Fact, No. 4). A copy of the restraining orders was left outside my office on or about September 4, 1989; I was never served in hand by a law enforcement officer (Affidavit). However, Ms. Greco personally delivered a copy of the restraining orders to the Boston Police on September 1, 1989 (Admissions of Fact, No. 2). Violation of such temporary restraining orders is a criminal offense. M.G.L. c.208, §34C. The temporary restraining orders left outside my office were not accompanied by a summons or a complaint (Affidavit); there is no return of service in the probate court file or on the docket. The probate court docket shows no order allowing service to be other than that prescribed by statute.

The *ex parte* hearing was tape-recorded and, pursuant to Supplemental Probate Court Rule 201, I am entitled to a cassette copy of the tape. Judge Mary C. Fitzpatrick presided at the hearing; John J. Scully, an assistant register of probate, functioned as the clerk. Although I requested a copy of the tape, the probate court never furnished one. Ultimately the probate court stated that the tape had been destroyed; the destruction of the tape was determined to be in violation of Rule 201. *Greco v. Suffolk Division of the Probate and Family Court Department*, 418 Mass. 153 at 157 n. 9, 635 N.E. 2d 243 (Mass. 1994).

Ms. Weaver advised Ms. Greco to open a separate bank account into which she placed the funds from the $40,000 certificate of deposit (Rita Greco, Deposition at 169-70). Ms. Weaver denies in her affidavit ever speaking with anyone at Atwood & Cherny (¶10). However, the telephone logs of Muriel

Carpenter show that Ms. Weaver telephoned Atwood & Cherny on September 28, 1989 (State Court Appendix, p. 36). This call was shortly after the probate court ordered that the $40,000 be frozen and that the funds be used solely to pay the mortgage on the Duxbury land. In December 1989 Atwood & Cherny received $10,000 from the funds that had been frozen by order of the probate court (State Court Appendix, p. 37). Atwood & Cherny did not request leave of the court to receive this money (Affidavit of Jacob Atwood). In April 1990 Atwood & Cherny obtained leave of the probate court to take the funds remaining from the $40,000 C.D. as their fees. With that money depleted, we were unable to continue to meet the mortgage payments and the bank foreclosed the Duxbury land.

In June 1990 I received leave from the probate court to depose Ms. Weaver and served her with a deposition subpoena. Atwood & Cherny wrote to Ms. Weaver and instructed her to ignore the subpoena (State Court Appendix, p. 57). Ms. Weaver did not appear for her deposition.

The Plymouth Savings Bank, which held the mortgage on the Duxbury land, claimed a $46,000 shortfall after the auction and brought suit. This resulted in a judgment for the full amount of the claimed loss against me alone.

ARGUMENT

Referring to the judgment of divorce the superior court wrote: "I find that the principles of *res judicata* bar Dr. Greco from raising his claim of fraud in this court" (Appendix, p. 4). The appeals court quite correctly did not affirm on this basis. Fraud is a tort. "The plaintiff could not

have recovered damages for the tort in the divorce action, as the Probate Court does not have jurisdiction to hear tort actions and award damages." *Heacock v. Heacock*, 402 Mass. 21 at 24 (1988). Because the appeals court and the supreme judicial court affirmed summary judgment on the basis of insufficiency of evidence, argument will focus on those issues.

As will be analyzed more fully below, frame of mind is an element of each of the tort counts in this case. The respondents provided affidavits only from themselves, each an interested party. "The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sartor v. Arkansas Nat. Gas Corp*. 321 US 620, 628 (1943) (quoting Sonnentheil v. Christian Moerling Brewing Co. 172 US 401, 408). Hence as a matter of law, affidavits only from parties to the suit can not be deemed to show the absence of an issue where frame of mind is an element. In the instant case, the situation is far worse. The Massachusetts courts ignore uncontested facts which impeach the credibility of the respondents.

I. Uncontested facts require that the credibility of the respondents be determined by a jury.

Ms. Weaver kept notes on her meetings with Ms. Greco. These notes, together with records from Blue Shield of Massachusetts, were produced during discovery and were impounded by the superior court. One entry in Ms. Weaver's notes states that there were only two sessions with Ms. Greco in September 1989. However, Ms. Weaver billed Blue Shield for

four sessions with Ms. Greco in September 1989. This discrepancy implies that Ms. Weaver fabricated the notes that she submitted during discovery in order to conceal the true subject of their meetings. Ms. Weaver has made no attempt to explain the discrepancy or to rebut its clear implication. Notwithstanding the fabrication, the notes clearly show that Ms. Weaver and Ms. Greco discussed the Duxbury land around the time of the refinancing.

Uncontested facts also impeach the credibility of Mr. Atwood. Mr. Atwood has testified that there are two partners in his firm and that there is no office manager. "The partners manage the affairs of the business" (Deposition, Vol. II, at 13). The partners set up the system by which account numbers are assigned to each case (Deposition, Vol. II, at 13). When shown the invoice to Ms. Greco dated September 1, 1989, his attention was called to the account number "10-JMA00000993-1A." He was able to identify "JMA" as his initials and "993" as the serial number (Deposition, Vol. II at 14). When asked what "1A" signified, he responded: "I frankly don't recall. I know it has a reason, but I don't know what it is. I am sure it is an internal reason." (Deposition, Vol. II at 15). The significance of these facts is quite clear. As mentioned in the Statement of Facts, "1A" in Massachusetts refers to a "no-fault" divorce as opposed to a divorce for cause such as cruel and abusive treatment. Atwood & Cherny has used "1A" in this sense (Divorce Pretrial Conference at 7). The September 1, 1989 invoice is the earliest one produced in discovery and is dated *after* Mr. Atwood drafted the complaint alleging *more than one instance of cruel and abusive treatment*. Either Mr. Atwood knew the

case to be "no fault" the day after he claimed otherwise or he failed to change a label initiated at an earlier time, before the refinancing of the Duxbury land and keeping with the testimony of Ms. Carpenter (Deposition at 21). In either case, the Massachusetts courts would rule that memory loss is an affirmative showing for summary judgment.

For the credibility of Ms. Greco one need only refer to the instances already mentioned in the Statement of Facts. Ms. Greco is well-educated and holds a graduate degree in molecular biology. Even assuming that I had made the "threats" that she claimed, how could I sell assets to which she held title and how could I leave her with no money for support when there was a $40,000 certificate of deposit in her name alone?

II. The respondents fail to identify a single element of any count that fails

The Massachusetts courts fail to consider the body of evidence as a whole. The opinions focus on a small segment of the evidence when discussing each count, as if all other evidence had no bearing. As argued above, affidavits from interested parties can not constitute an affirmative showing for any element involving frame of mind. *Sartor v. Arkansas Nat. Gas Corp.* 321 US 620, 628 (1943). Furthermore, the respondents conducted no discovery and therefore, as a matter of law, could not make an affirmative showing that I was not damaged. The other elements of each count will be discussed first and the issue of damage will be dealt with afterwards.

A. The Rule 11 claim

The claim for Rule 11 sanctions against Atwood & Cherny (Count Four) was initially brought as part of my countercomplaint for divorce. On the second day of the trial, the probate judge severed the claim from the divorce action and ordered that I must file it as a separate complaint (Appendix, p. 11 n. [2]). The probate judge found that I had not been cruel and abusive. Massachusetts Rule 11 tracks its federal counterpart. "Rule 11(a) requires 'good ground' to support a pleading. That criterion has been thought to require reasonable inquiry and an absence of bad faith." *Bird v. Bird*, 24 Mass. App. Ct. 362, 368 (1987). Making allegations known to be false at the time constitutes bad faith. I moved for summary judgment only on that part of the Rule 11 claim involving due diligence because it is uncontested that Atwood & Cherny relied solely on information from Ms. Greco. It was error for the Massachusetts courts to include the entire claim in the scope of my motion (Appendix, p.1 & pp. 8-10) because the determination of bad faith could not be made by affidavit of a party. In support of my claim I cited six facts from which a trier of fact could infer that Atwood & Cherny acted in bad faith; the parties rebutted none of them in their affidavits.

B. The fraud count

Count One alleges fraud by Ms. Greco. "Under Massachusetts law, to establish a cause of action for fraud and deceit, a plaintiff must offer proof that the defendant made a false

representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage." *Mass. Jur.*, *Personal Injury and Tort*, §13:2. "[A] misrepresentation as to present intent is a sufficient basis for liability in an action for deceit." *Mass. Jur.*, *Personal Injury and Tort*, §13:4. Present intent involves frame of mind on the part of Ms. Greco. The testimony of Ms. DeFalco that Ms. Greco was interested in divorcing me before the refinancing supports my contention that she misrepresented her present intent. At the time of the refinancing, Ms. Greco had no intention of purchasing the neighboring building. This element is supported by evidence and must be determined by a jury. That Atwood & Cherny and Ms. Weaver aided and abetted Ms. Greco in this fraud is discussed below. Under Massachusetts law, Atwood & Cherny and Ms. Weaver are therefore liable for the damages of the fraud. *Jurgen v. Abraham*, 616 F. Supp. 1381 (D.C. Mass. 1985). That I relied on this misrepresentation in co-signing the promissory note was not contested, nor could it have been because the respondents conducted no discovery. Therefore, these elements of fraud have been established; the issue of damages is discussed below.

C. Abuse of process

Count Three alleges abuse of process. "The tort of abuse of process consists in the use of lawful process primarily for a purpose for which it is not intended. The essential elements of the tort are (1) "process" was used;

(2) for an ulterior or illegitimate purpose; (3) resulting in damage." *Mass. Jur., Personal Injury and Tort*, §12:33.

There were two sets of process in this case. The summons for the divorce complaint brought me under the jurisdiction of the probate court for the purpose of adjudicating that complaint and notified me that the action had commenced. This summons was served on September 21, 1989 and no abuse of process is claimed for this. However, process concerning the restraining orders was abused. The situation between September 1, 1989, when the restraining orders were issued, and September 21, 1989, when I was served with the summons, is somewhat befuddled. There was no summons served with the restraining orders even though a standard form existed, Form CJ-D 212 mentioned above. However, a copy of the orders was given to the Boston Police. Because violation of the orders was a criminal offense and I could have been arrested simply for going home, I was clearly brought under the jurisdiction of the probate court by the restraining orders. Hence the restraining orders constitute process in this case. Neither the respondents nor the Massachusetts courts address this point; they simply ignore it. Silence can not constitute an affirmative showing. It must therefore be taken that this element is established for the purposes of summary judgment. Furthermore, abuse of process comprehends the misuse of such temporary injunctions. "[A]n action for abuse of process may be an appropriate remedy when a party uses the process necessary to institute a civil action, culminating in an injunction, for ulterior or illegitimate purposes." *Jones v. Brockton Public Markets, Inc.* 369 Mass. 387, 390 n. 2 (1975).

The purpose of such *ex parte* orders is the prevention of immediate and irreparable harm. The restraining orders were sought pursuant to M.G.L. c. 208, §34B and Rule 65, Mass. R. Dom. Rel. P.. Massachusetts Rule 65 tracks its federal counterpart. Rule 65(a) states that a "temporary restraining order may be granted without written or oral notice to the adverse party *only if* it clearly appears from specific facts shown by affidavit or by verified complaint that *immediate and irreparable injury, loss, or damage* will result to the applicant before the adverse party or his attorney can be heard in opposition" (emphasis added). Strictly, the purpose of the respondents in seeking the restraining orders involves frame of mind and can not be resolved by affidavits from the parties alone. *Sartor v. Arkansas Nat. Gas Corp.* 321 US 620, 628 (1943). However, the record contains uncontested facts from which it may be inferred that there was an ulterior motive. What was the purpose in serving the restraining orders in a manner which violates M.G.L. c. 208, §34C as described in the Statement of Facts? Why was Marianne James, a friend of Ms. Greco, asked to serve the temporary restraining orders instead of a law enforcement officer? No respondent attempts to resolve the questions of purpose that arise from the improper service of the restraining orders. Furthermore, in Massachusetts a judge is on call twenty-four hours a day to issue emergency restraining orders. There was a delay of four days between the alleged threat that I made and the *ex parte* hearing. An impartial trier of fact might conclude that this delay indicated that the respondents did not believe that there was any danger of immediate or irreparable harm. No respondent made any affirmative showing that this

was not the case. For the purposes of summary judgment, this element must be taken as established. The element of damage will be discussed below.

D. Conspiracy

Count Two alleges conspiracy among the respondents. "A civil conspiracy consists of a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Mass. Jur., Personal Injury and Tort*, §9:1. It is uncontested that the respondents acted in combination. Ms. Weaver advised Ms. Greco to contact Atwood & Cherny (Rita Greco, Deposition at 187). Ms. Weaver telephoned Atwood & Cherny on September 28, 1989 (State Court Appendix, p. 36). Before Ms. Weaver was confronted with this record, she denied ever having any contact with Atwood & Cherny, from which it may be inferred that she was trying to conceal this contact. Of more significance is that Atwood & Cherny advised Ms. Weaver not to obey a subpoena (Letter dated July 5, 1990). This letter not only shows that Ms. Weaver and Atwood & Cherny acted in combination but also that they acted to attain a lawful purpose (quashing the subpoena) by an unlawful means. In *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 158, 90 S.Ct. 1598 (1970), this court held that the mere presence of a police officer in the store would constitute sufficient basis to allow a jury to decide whether or not the officer and an employee had a "meeting of minds" and formed a conspiracy. In the instant case the contact among the respondents is far more extensively documented. The purpose of the respondents

in acting together can not be affirmatively shown by affidavits from the parties. For the purposes of summary judgment, this count must be taken as established.

The superior court wrote that to prove conspiracy, I must establish "that there was some 'particular power of coercion of [me] possessed by the defendants in combination which any individual standing in a like relationship to [me] would not have had.'" (Appendix, p.5). I have presented evidence that the respondents had such unusual power but the Massachusetts courts have simply ignored my argument. M.G.L. c. 233 §20B grants patient-psychotherapist privilege to Ms. Weaver and Ms. Greco; clearly Ms. Greco and Atwood & Cherny have attorney-client privilege. If three such individuals conspire, the only link open to discovery is the one between psychotherapist and attorney. If those two should deny any contact, as the respondents originally tried to do, the circle becomes complete and the three may work in combination with virtual legal immunity. That I have been able to show that there was contact is more probative of the arrogance and carelessness that such immunity inspires than the lack of unusual power of the respondents in combination. While not strictly germane to this case, it may be noted that the usual occurrence of such a conspiracy is in a child custody dispute where Ms. Weaver becomes the client's advocate in dealing with social workers and Mr. Atwood becomes the advocate in dealing with the judges; in Massachusetts the courts do not treat such advocacy on the part of a therapist as waiving privilege. In the instant case, the issue of privilege comes to bear on one critical fact: when was the date of first contact between Ms. Greco and Ms. Weaver and between Ms. Greco

and Atwood & Cherny. The testimony of Ms. DeFalco and Ms. Carpenter above place the date before the refinancing of the Duxbury land. The respondents all claim it was after the refinancing. If the respondents are lying, then this is coordinated perjury and the unusual power of testimonial privilege allows them to do so with impunity. In order to dismiss the conspiracy count on this basis, the Massachusetts courts would have to rule that coordinated perjury is not a conspiracy; they have not done so yet. Even without the conspiracy count, if an impartial trier of fact found that the respondents worked together before the refinancing of the Duxbury land, Atwood & Cherny and Ms. Weaver would be liable for aiding and abetting Ms. Greco in fraud. *Jurgen v. Abraham*, 616 F. Supp. 1381 (D.C. Mass. 1985).

E. The element of damages

In the complaint I demand judgment for economic loss, harm to my reputation, and for pain and suffering. "Recovery allowed in Massachusetts for the wrongful use of process includes injury to the feelings of the injured person. Damages may also be awarded to compensate for the necessity of incurring counsel's fees to defend against the abusive claim and to compensate for inconvenience to the plaintiff caused by such a claim." *Mass. Jur., Personal Injury and Tort*, §13:28. The respondents conducted no discovery and, therefore, by their own affidavits can not make an affirmative showing that I suffered no damage. *Sartor v. Arkansas Nat. Gas Corp.* 321 US 620, 628 (1943). Part of my economic loss stems from the foreclosure of the Duxbury land. However, the

Massachusetts courts seem to treat the foreclosure of the Duxbury land as my only damage. The superior court then argues that I was not damaged at all because I received some benefit from the proceeds of the refinancing (Appendix, p. 5). This argument is erroneous because it ignores the other damages and because it confuses the distribution of marital assets upon divorce with an award of damages for tort. Under Massachusetts law, marital assets are distributed according to the relative contributions of the parties to the estate, not to award damages. *Heacock v. Heacock*, 402 Mass. 21, 24 (1988). For the purposes of summary judgment, the element of damage must be taken as established.

III. The Massachusetts courts have dismissed this case in order to cover-up involvement of the judiciary in these incidents.

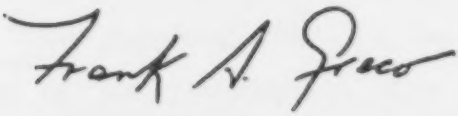
As detailed in the Statement of Facts, the probate court violated at least two statutes in issuing the *ex parte* restraining orders on September 1, 1989. The italics underscore that it was Judge Fitzpatrick who should have ordered the hearing within five days and Assistant Register Scully who should have seen to the proper service of the orders. The failure of the probate court to use the proper forms (CJ-D 212 and 421) confirms that the violation of the statutes was quite deliberate. The probate court then illegally destroyed the tape of that hearing. *Greco v. Suffolk Division of the Probate and Family Court Department*, 418 Mass. 153, 635 N.E. 2d 243 (Mass. 1994). That tape contained evidence that was highly relevant to this case. Was it discussed whether or

not to order a hearing in five days? Was it discussed whether Ms. Greco's friend or a law enforcement officer should serve the restraining orders? Were it not for judicial immunity, Judge Fitzpatrick and Mr. Scully would have been defendants in this case. Their involvement in the illegal destruction of the tape, however, is currently before this Court (*Greco v. Fitzpatrick, et al.*, No. 95-1130). For the judiciary in Massachusetts to violate statutes, connive at the fabrication of records by Ms. Weaver, destroy evidence and then dismiss my case for lack of evidence should be disquieting for anyone who believes in the rule of law. There is a darkness in Massachusetts and we look to this Court for help.

CONCLUSIONS

Because the Supreme Judicial Court of Massachusetts has so far departed from the accepted and usual course of judicial proceedings, because the dismissal by summary judgment conflicts with the standards set by this Court in *Sartor v. Arkansas Nat. Gas Corp.*, and because such dismissal violates petitioner's constitutional right to a trial by jury, certiorari on these questions should be granted.

Respectfully submitted,



Frank A. Greco, M.D., Ph.D.
Pro Se
250 Grove St.
Lexington, MA 02173
(617) 860-9897

I hereby swear to the truthfulness of all statements of fact made herein under the pains and penalties of perjury, this the 26th day of January 1996.

APPENDIX

Judgment (Rule 56), Superior Court (April 28, 1994) 1

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss. SUPERIOR COURT

CIVIL ACTION

NO. 92-5352-C

FRANK A. GRECO

v.

RITA GRECO and others[1]

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Frank A. Greco, M.D. (Dr. Greco), filed this tort action seeking damages for personal injuries. The action is brought against the plaintiff's former wife, Rita Greco (Ms. Greco); his wife's former therapist, Beverly Weaver (Weaver), and the law firm of Atwood & Cherny, which represented Ms. Greco during her divorce. Weaver counterclaimed against Dr. Greco alleging abuse of process.

The defendants seek summary judgment contending that Dr. Greco is barred from bringing his action, and that he has established insufficient facts to support his claims. Dr. Greco has moved for summary judgment against Atwood & Cherny Count Four of the Complaint alleging that he is entitled to judgment as a matter of law, and on Weaver's counterclaim asserting that insufficient facts exist to support her claim.

For the reasons stated below, summary judgment for all defendants on all counts of the Complaint is ALLOWED; summary judgment for the plaintiff on Count four of the Complaint is DENIED, and summary judgment for Dr. Greco on Weaver's counterclaim is ALLOWED.

BACKGROUND

The present claims stem from an earlier divorce action

between Dr. Greco and Ms. Greco. In March of 1985, while married, the Grecos purchased real estate in Duxbury, Massachusetts. In July of 1989, they refinanced this property and received $80,000 in proceeds. The Grecos used these proceeds to repay the educational loans of Dr. Greco and to purchase a certificate of deposit.

About this time, Ms. Greco sought marriage counselling from Weaver, a licensed psychiatric nurse. Shortly thereafter, in August of 1989, Ms. Greco decided to divorce Dr. Greco. In connection with this divorce, Ms. Greco retained Atwood & Cherny, a firm recommended by Weaver. On September 1, 1989, Ms. Greco filed for divorce, alleging grounds of cruel and abusive treatment. On the same date, Ms. Greco obtained an *ex parte* temporary restraining order against the [*sic*] Dr. Greco.

The divorce trial commenced in January of 1991. By this time, both Dr. Greco and Ms. Greco were advancing as *pro se* litigants. Despite the fact that Atwood & Cherny no longer represented Ms. Greco, Dr. Greco filed for sanctions against Atwood & Cherny pursuant to Rule 11 of the Mass. R. Civ. P. The Probate Court, Judge Christina L. Harms, severed the Rule 11 motion from the divorce proceeding on the grounds that it was distinct from that proceedings[2]. A full divorce trial was held before Judge Harms. At the conclusion of the trial, Judge Harms granted divorce *nisi* to Ms. Greco on grounds of irretrievable breakdown and issued her findings of fact and conclusions of law. Among other things, Judge Harms ruled that Dr. Greco and Ms. Greco were to divide the assets and liabilities equally from the Duxbury land.[3]

Dr. Greco now claims injury relating to several aspects

of the divorce litigation. Dr. Greco alleges: (1) that Ms. Greco perpetrated fraud which Weaver and Atwood & Cherny aided and abetted; (2) that the defendants' conduct constitutes a civil conspiracy; (3) that Ms. Greco and Atwood & Cherny committed abuse of process; and (4) that Atwood & Cherny violated Rule 11. In response to these claims, Weaver claims Dr. Greco himself committed abuse of process.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community National Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue "and [further,] that the moving party is entitled to judgment as a matter of law." *Pederson v. Times, Inc.* 404 Mass. 14, 16-17 (1989). A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case or by "demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991);*accord*, *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to

defeat [the] motion." *Pederson*, 404 Mass. at 17. "[T]he opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment." *LaLonde v. Eisner*, 405 Mass. 297, 299 (1989).

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

A. Count One (Fraud)

Ms. Greco contends that *res judicata* and collateral estoppel bar Counts One, Two and Three of Dr. Greco's Complaint. More specifically, Ms. Greco claims that the Probate Court previously addressed issues concerning the division of the land in Duxbury, the subject of these counts, and found that Ms. Greco committed no wrongdoing. Accordingly, she argues, Dr. Greco cannot now bring a claim to the contrary. With respect to Count One, I agree. *Res judicata* and collateral estoppel, often referred to as claim preclusion and issue preclusion respectively, are legal doctrines by which judgment in one action has a binding effect on another. *Bagley v. Maxley*, 407 Mass. 633, 636 (1990); *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988). Claim preclusion "prohibits the maintenance of an action on the same claim that was the subject of an earlier action between the same parties or their privies." *Heacock*, 402 Mass. at 23 n. 2. Issue preclusion "prevents litigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." *Id.*

I find that the principles of *res judicata* bar Dr. Greco from raising his claim of fraud in this court. As noted, the Probate Court considered the division of marital assets. This consideration necessarily provided Dr. Greco an

opportunity to raise issues concerning Ms. Greco's representations as to the distribution of the refinancing proceeds. As such, the Probate Court's findings and rulings settled disputes between the parties as to distribution of these assets.

Moreover, as argued by Ms. Greco, Dr. Greco's claim of fraud fails as a matter of law because he has already received over half the proceeds in question. Dr. Greco used $40,000 of the $80,000 total proceeds to repay his educational loan debt. Later, during the divorce litigation, part of the remaining funds were used to pay attorneys' fees for both Dr. Greco and Ms. Greco.

Because Dr. Greco cannot establish a claim against Ms. Greco for fraud, the claims against Weaver and Atwood & Cherny for "aiding and abetting" likewise fail. Summary judgment is thus appropriate for all defendants on Count One.[4]

B. Count Two (Civil Conspiracy)

Dr. Greco's second count alleges conspiracy against all defendants. "Civil conspiracy is a very limited cause of action in Massachusetts." *Jurgen v. Abraham*, 616 F. Supp. 1381, 1386 (D.C. Mass. 1985). A tort of civil conspiracy exists only "where mere force of numbers acting in unison or other exceptional circumstances make a wrong." *DesLauries v. Shea*, 300 Mass. 30, 33 (1938) (quoting *Caverns v. Fellows*, 286 Mass. 400, 444 (1934)).

To prove conspiracy, Dr. Greco must establish "that there was some 'particular power of coercion of [him] possessed by the defendants in combination which any individual standing in a like relationship to [him] would not have

had.'"

DesLauries, 300 Mass. at 33 (quoting *Cummings v. Harrington*, 278 Mass. 527, 530 (1931)). The defendants claim that Dr. Greco cannot establish sufficient facts to support this cause of action.

In support of this count, Dr. Greco alleges that the defendants worked together to exercise an unusual power over him which "enabled them to use legal means for illegal purpose and illegal means for legal purposes." Dr. Greco points toward the following evidence to verify these allegations: (1) Weaver advised Ms. Greco to contact Atwood & Cherny; (2) Weaver telephoned Atwood & Cherny; (3) Weaver coached Ms. Greco in order to suggest cruel and abusive treatment to Atwood & Cherny; (4) Atwood & Cherny instructed Ms. Greco to ignore a subpoena; and (5) both Weaver and Atwood & Cherny coordinated Ms. Greco's perjury. These unsubstantiated allegations do not qualify as sufficient evidence to support civil conspiracy.

It is immaterial that Weaver recommended or contacted Atwood & Cherny. Other than merely stating the remaining allegations, Dr. Greco offers no proof that the alleged conduct occurred. Even if he could prove such allegations, they would not constitute civil conspiracy. See *DesLauries*, 300 Mass. at 33 (requiring "exceptional circumstances" to establish claim). Therefore, summary judgment shall be entered against Dr. Greco and for the defendants on this count.

C. Count Three (Abuse of Process)

Dr. Greco contends that Ms. Greco and Atwood & Cherny engaged in abuse of process.[5] Massachusetts courts disfavor abuse of process claims in order that "honest litigants [are

not] deterred from invoking the aid of the counts [Isic] for fear of subjecting themselves to a lawsuit in return." *Cohen v. Hurley*, 20 Mass. App. Ct. 439, 443 (1985) (quoting *Hubbard v. Beatty & Hyde, Inc.*, 343 Mass. 258, 262-63 (1961)). Nevertheless, an actionable tort of abuse of process exists when it "appear[s] that the [legal] process was used to accomplish some ulterior purpose for which it was not designed or intended, or which it was not the legitimate purpose of the particular process employed." *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775 (1986) (citations omitted).

The elements of abuse of process are: (1) the use of process, (2) for an ulterior motive or illegitimate purpose, (3) resulting in damage. *Id.* at 775-76. To constitute an ulterior motive or illegitimate purpose, process "must be clearly outside the interests properly pursued in the proceeding." *Broadcast Management Servs. v. Cullinet Software*, 652 F. Supp. 1501, 1503 (D. Mass. 1987). Process must be used with more than an "intention to harass," but as "a threat or a club" or "a form of extortion." *Id.* at 1503; *Cohen*, 20 Mass. App. Ct. at 442.

In my view, Dr. Greco makes no such showing. Dr. Greco claims that the defendants had the following ulterior purposes: (1) denigration of his image before the Probate Court and his general reputation; (2) conversion of the remaining interest from the refinancing of the land in Duxbury; and (3) improper wagering in the custody for his daughter.

Dr. Greco again fails to present evidence to support his claim. The evidence presented does not suggest the perversion of process common to successful claims. See *Broadway*

Management, 652 F. Supp. at 1503 (citing successful cases); *American Velodur Metal, Inc. v. Schinabeck*, 20 Mass. App. Ct. 460, 469-70 (1985). In *American Velodur*, a husband sued his wife during the pendency of a divorce litigation to enjoin her from occupying the marital residence. The Court affirmed a ruling to award damages for the abuse of process based on its finding that the husband's action had no purpose other than to settle the divorce actions on terms favorable to him. *American Velodur*, 20 Mass. App. Ct. at 469-70. Unlike *American Velodur*, here the process implemented had legitimate uses. Ms. Greco resorted to the judicial process to obtain a restraining order and divorce from Dr. Greco. No evidence before me suggests an ulterior motive. Therefore, summary judgment is appropriately entered against Dr. Greco on the abuse of process count.

D. Count Four (Rule 11)

Dr. Greco claims that Atwood & Cherny's conduct during the divorce violated Rule 11. As grounds for Rule 11 sanctions, Dr. Greco identifies both a motion for temporary restraining order and the divorce complaint, each of which Atwood & Cherny filed on behalf of Ms. Greco. Dr. Greco argues that Atwood & Cherny either knew that these pleadings were false or failed to exercise due diligence in verifying their truthfulness. Atwood & Cherny defends against these allegations by asserting affirmative proof to negate essential elements of Dr. Greco's claim. Because Dr. Greco fails to counter with facts which establish the existence of a genuine issue of material fact, I grant Atwood & Cherny summary judgment on this count.

As ground for the pleadings filed, Atwood & Cherny set

forth evidence available at the time of the pleadings. Weeks before the divorce, Ms. Greco requested that Dr. Greco leave the marital residence. As demonstrated by her affidavit, Ms. Greco believed that Dr. Greco would take their daughter to Illinois and empty her bank accounts in order to leave her without support. Also, Ms. Greco indicated by affidavit that her husband was "very irate" and that she feared him. Consistent with such fear, Ms. Greco herself changed the locks at her marital home on August 31, 1989. In light of this evidence, there was assuredly an adequate basis for Atwood & Cherny to file for a temporary restraining order and for divorce based on the grounds of cruel and abusive treatment.

In support of his position, Dr. Greco points to issues of fact and law which he alleges Atwood & Cherny either knew or should have known. Dr. Greco suggests deficiencies concerning Atwood & Cherny's representation of Dr. Greco's lack of roots in the community and Dr. Greco's alleged threat to take their daughter to Illinois. Additionally, Dr. Greco claims Atwood & Cherny failed to contact Dr. Greco's attorney and improperly relied on Ms. Greco's statements. At most, these assertions indicate that a deeper inquiry was possible. Such a possibility of more complete investigation before filing a divorce complaint on behalf of a client or a motion for restraining order does not serve as grounds for sanctions under Rule 11.

Dr. Greco also claims that Atwood & Cherny failed to make adequate review of the law concerning irreparable harm. Under M.G.L. c.208, §34B, irreparable harm is required to obtain an order to vacate the marital home. Dr. Greco claims that, as a matter of law, no irreparable harm occurs when a

parent takes a child to another state. In support of this proposition, Dr. Greco cites *Commonwealth v. Beals*, 405 Mass. 550 (1989), where the Court held that a parent may not be criminally prosecuted under a kidnapping statute for removing his child from the state before litigation. *Beals*, 405 Mass. at 554-55. *Beals* is inapposite to this case. See *id*. That the Commonwealth could not prosecute Dr. Greco for kidnapping has little, if any, bearing on whether irreparable harm could flow from his actions in a civil venue. For these reasons, I deny Dr. Greco's motion for summary judgment and grant Atwood & Cherny summary judgment on this count.

II. Weaver's Counterclaim

Weaver counterclaimed against Dr. Greco alleging abuse of process. Dr. Greco seeks summary judgment on this claim alleging that Weaver cannot establish facts to support her cause of action. The legal principles applicable to abuse of process are set forth above in section I(C) of this opinion. As noted, to establish a claim for abuse of process, Weaver must demonstrate that Dr. Greco was motivated by an "ulterior purpose." See *Datacomm Interface*,, 396 Mass. at 775-76. Although Dr. Greco has failed to present sufficient evidence to sustain his claims, I find no evidence of an illegitimate purpose in his actions to warrant liability. See *Cohen*, 20 Mass. App. Ct. at 442. Summary judgment is therefore appropriate for Dr. Greco on this count.

ORDER

It is hereby ordered that summary judgment for the defendants on all counts of the Complaint is ALLOWED; summary judgment for the plaintiff on Count Four of the Complaint is DENIED, and summary judgment for Dr. Greco on Weaver's

counterclaim is ALLOWED.

s/Margaret R. Hinkle

Margaret R. Hinkle

Justice of the Superior Court

DATED: April 28, 1994

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[1] Beverly Weaver and Atwood & Cherny

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[2] Judge Harms instructed Dr. Greco that if he wished to pursue his Rule 11 claim, he had to file a complaint against Atwood & Cherny. Judge Harms also expressly invited the parties to request that she be assigned to hear any Rule 11 proceedings in the future. Apparently, neither party accepted that invitation.

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[3] Judge Harms made the following findings and ruling on this issue: ["]1) land in Duxbury -- This land was purchased in 1985. The land was refinanced in 1989 for $120,000. The parties got $80,000 from this refinancing and split the money equally between themselves. The husband used his half to pay off debts; the wife used her half to buy a Certificate of Deposit (C.D.) in her name and thereafter cashed the C.D. to pay off debts. The land was foreclosed by the bank in January, 1991.["]

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[4] Since Dr. Greco does not limit his allegations to the division of marital assets in Counts Two and Three, summary judgment on preclusion principles is not proper for those counts.

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[5] Although it is not apparent on the face of the Complaint that any party other than Ms. Greco is named in this count, Atwood & Cherny seeks summary judgment on Count Three. Their inclusion affects neither my analysis nor my ruling on this count.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

94-P-1123

FRANK A. GRECO

vs.

ATWOOD and CHERNY & others[1]

MEMORANDUM AND ORDER UNDER RULE 1:28

The plaintiff, acting pro se, brought an action in the Superior Court alleging fraud, conspiracy and abuse of process on the part of his former wife, her former therapist, and the law firm that, for a period of time, represented the wife in her divorce action against the plaintiff. The plaintiff also sought damages from the defendant law firm for alleged violations of Mass. R. Civ. P. 11(a), 365 Mass. 753 (1974). After a hearing, the judge allowed the defendants' motions for summary judgment on all counts of the complaint, denied the plaintiff's motion for summary judgment on the rule 11 claim, and allowed the plaintiff's motion for summary judgment on defendant Weaver's counterclaim for abuse of process (A. 160-161, 171).

We affirm the judgment.[2] Even if we were to assume that the plaintiff was not barred by the doctrine of claim or issue preclusion from bringing all or a part of his action, see *Heacock v. Heacock*, 402 Mass. 21 (1988); cf *Apostolicas Properties Corp. v. Richman*, 28 Mass. App. Ct. 671, 676-678 (1990), summary judgment was properly entered in favor of the defendants as the materials submitted to the court demonstrate that the plaintiff had no reasonable expectation of proving essential elements of each of his claims. See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716

(1991). See also *A. John Cohen Ins. Agency, Inc. v Middlesex Ins. Co.*, 8 Mass. App. Ct. 178, 183 (1979). Similarly, even if we were to assume that the plaintiff could bring an independent action against the defendant law firm for alleged violations of Mass. R. Civ. P. 11(a) 2 [3], for substantially the reasons set forth in Atwood & Cherny's brief, at 20-22, summary judgment was properly entered in favor of the firm. See also *Callahan v. Board of Bar Overseers*, 417 Mass. 516, 519 (1994). There is nothing in the plaintiff's remaining contentions that would require a reversal of the judgment.

Judgment affirmed.

By the Court (Armstrong, Jacobs & Porada, JJ,)

s/Mary Turk Foley

Clerk

Entered: June 5, 1995.

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[1] Rita Greco and Beverly Weaver

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[2] In July, 1994, the plaintiff sought and was granted leave by this court to file a motion for relief from judgment in the Superior Court. In his request for leave to proceed below, the plaintiff stated that new evidence had become available to him which could not have been obtained prior to the hearing on the motions for summary judgment, and that if his motion for relief was granted it would render moot the present appeal. In his brief, dated October 2, 1994, the plaintiff states that his motion was "proceeding" in the Superior Court (appellant's brief, at 3). In May, 1995, we

sent for updated docket entries in the case to determine the status of the motion for relief from judgment. As of May 16, 1995, there was no indication on the docket that the plaintiff had filed such a motion. In the circumstances, we think the plaintiff has waived implicitly, at this juncture, his right to file and proceed on a motion for relief from judgment in the Superior Court. See Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974), which imposes a one year limitation period from the entry of the judgment, order or proceeding.

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[3] Rule 11(a) provides, in part:"The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.... For a wilful violation of this rule and attorney may be subjected to appropriate disciplinary action." At the divorce hearing, the plaintiff an award of damages based on alleged rule 11 violations by the defendant law firm (A. 88). The judge severed the rule 11 claim from the divorce trial because the firm was not a participant in the proceedings (A.88). The judge stated that should the plaintiff wish to pursue his rule 11 claim, that "he must at a minimum file a separate complaint setting forth his claim, and his complaint must be served upon Atwood & Cherny" (A.88).

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Frank A. Greco
250 Grove Street
Lexington, MA 02173

RE: Docket No. FAR-08002
FRANK A. GRECO
vs.
ATWOOD & CHERNY & others

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on September 6, 1995, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk
Dated: September 6, 1995
To: Frank A. Greco
Jacob M. Atwood, Esquire
Pasquale DeSantis, Esquire
James B. Peloquin, Esquire
R. Jacob Walters, Esquire

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Frank A. Greco
250 Grove Street
Lexington, MA 02173

RE: No. FAR-08002
FRANK A. GRECO
vs.
ATWOOD & CHERNY & others

NOTICE OF DOCKET ENTRY

Please take note that on October 30, 1995, the following entry was made on the docket of the above-captioned case: DENIAL of petition for reconsideration of denial of FAR application.

Jean M. Kennett, Clerk
Dated: October 30, 1995
To: Frank A. Greco
Jacob M. Atwood, Esquire
Pasquale DeSantis, Esquire
James B. Peloquin, Esquire
R. Jacob Walters, Esquire